

**United States Department of Labor
Employees' Compensation Appeals Board**

T.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bethesda, MD, Employer**

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**Docket No. 16-1818
Issued: December 28, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 12, 2016 appellant filed a timely appeal from an August 10, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.²

ISSUE

The issue is whether appellant met his burden of proof to establish more than eight percent permanent impairment of the right lower extremity, for which he previously received a schedule award.

¹ 5 U.S.C. § 8101 *et seq.*

² The record includes evidence received after OWCP issued its August 10, 2016 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board lacks jurisdiction to review this additional evidence for the first time on appeal.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances outlined in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows. On August 17, 1995 appellant, then a 39-year-old letter carrier, injured his right knee in the performance of duty.³ OWCP initially accepted appellant's traumatic injury claim (Form CA-1) for right knee strain. It subsequently expanded the claim to include right knee lateral meniscus tear, which was surgically repaired on February 15, 1996. On September 30, 1996 appellant's surgeon released him to resume his full-time, letter carrier duties.

On December 3, 2002 OWCP granted appellant a schedule award for two percent permanent impairment of the right lower extremity. By decision dated September 29, 2003, the Board set aside the award and remanded the case for further consideration.⁴ On December 23, 2003 OWCP granted a schedule award for a total of eight percent permanent impairment of the right lower extremity.⁵ The award covered a period of 23.04 weeks beginning October 1, 2001.⁶

By decision dated May 14, 2008, OWCP denied appellant's claim for an additional schedule award. In a December 5, 2008 decision, the Board affirmed OWCP's May 14, 2008 decision.⁷ OWCP again denied an additional schedule award on March 5, 2012, which the Board affirmed by decision dated November 20, 2012.⁸

On August 9, 2013 appellant filed a claim for an additional schedule award (Form CA-7). In an October 21, 2013 report, Dr. Irvin A. Guterman, a Board-certified orthopedic surgeon, found 11 percent permanent impairment of the right lower extremity.⁹ He rated appellant under the sixth edition of the A.M.A., *Guides* (2009). Dr. Guterman found three percent permanent impairment based on appellant's partial lateral meniscectomy, and an additional eight percent permanent impairment for muscle atrophy.

In an October 4, 2014 report, OWCP's district medical adviser (DMA) found three percent permanent impairment of the right lower extremity based on appellant's 1996 right knee partial lateral meniscectomy. He disagreed with Dr. Guterman's additional eight percent rating for muscle atrophy, but noted the possibility of impairment due to right knee osteoarthritis. However, the DMA noted that Dr. Guterman had not provided the requisite joint space measurements for rating impairment due to arthritis.

³ Appellant was cutting across a yard and fingering mail when he tripped in a hole.

⁴ Docket No. 03-1006 (issued September 29, 2003).

⁵ The rating was based on a finding of two centimeter (cm) thigh atrophy under Table 17-6, American Medical Association, *Guides to the Evaluation of Permanent Impairment* 503 (5th ed. 2001).

⁶ In an amended decision dated March 10, 2004, OWCP reduced the amount of the award based on compensation previously paid pursuant to the December 3, 2002 schedule award.

⁷ Docket No. 08-1651 (issued December 5, 2008).

⁸ Docket No. 12-1191 (issued November 20, 2012).

⁹ Dr. Guterman performed appellant's February 15, 1996 right knee arthroscopic surgery.

By decision dated November 10, 2014, OWCP found appellant had not established that his right lower extremity permanent impairment exceeded the eight percent previously awarded.

Appellant timely requested a review of the written record by OWCP's Branch of Hearings and Review.

In a December 2, 2014 supplemental report, Dr. Guterman revised his previous rating. He continued to find three percent right lower extremity impairment based on appellant's 1996 partial lateral meniscectomy. However, Dr. Guterman also found an additional seven percent impairment due to arthritis, noting that there was x-ray evidence of a three-millimeter cartilage interval.¹⁰ According to Dr. Guterman, appellant's total right lower extremity permanent impairment was 10 percent.

By decision dated June 19, 2015, the hearing representative affirmed OWCP's November 10, 2014 decision.¹¹ She noted that OWCP had not accepted right knee degenerative changes (arthritis), and therefore, Dr. Guterman's additional seven percent rating for arthritis did not warrant further review. The hearing representative further noted that Dr. Guterman had not provided the underlying x-ray (October 21, 2013) report with cartilage measurements, and had not explained how the August 17, 1995 employment incident either caused or contributed to appellant's mild right knee arthritis.

Appellant appealed to the Board on July 6, 2016. By decision dated April 12, 2016, the Board set aside the hearing representative's June 19, 2015 decision, and remanded the case for further medical development. The Board noted, *inter alia*, that OWCP failed to refer Dr. Guterman's December 2, 2014 supplement report to the DMA for review.¹² Additionally, the record included a November 14, 1995 right knee magnetic resonance imaging (MRI) scan, the results of which were clearly suggestive of preexisting osteoarthritis. The Board explained that preexisting impairment to the scheduled member should be included in the rating.

In a May 15, 2016 report, the DMA, Dr. Morley Slutsky, Board-certified in occupational medicine, advised that, although Dr. Guterman reported a three-millimeter cartilage interval, he did not specify the affected right knee compartment(s). He also noted that a copy of the October 21, 2013 x-ray report had not been provided, and Dr. Guterman had not assigned grade modifiers or performed net adjustment calculations with respect to the ratings for partial lateral meniscectomy (three percent) and knee arthritis (seven percent). The DMA further explained that only one diagnosis should be used to rate appellant's knee impairment. He rated appellant based on his lateral meniscal tear and found two percent permanent impairment of the right lower extremity under Table 16-3, Knee Regional Grid, A.M.A., *Guides* 509 (6th ed. 2009).¹³

¹⁰ Dr. Guterman referenced an October 21, 2013 right knee x-ray.

¹¹ OWCP did not refer Dr. Guterman's December 2, 2014 supplemental report to its medical adviser prior to issuing the June 19, 2015 decision.

¹² *Order Remanding Case*, Docket No. 15-1502 (issued April 12, 2016).

¹³ Two percent was the default grade (C) for a meniscal tear under Table 16-3. Dr. Slutsky calculated a net adjustment of zero, thereby warranting no adjustment from the default rating of two percent.

On May 18, 2016 OWCP sought clarification from the DMA as to whether the current two percent rating was in addition to the previous award of eight percent right lower extremity permanent impairment.¹⁴

In a May 23, 2016 report, Dr. Slutsky explained that the previous eight percent award was for thigh atrophy (two centimeters) under the A.M.A., *Guides* (5th ed. 2001). He further explained that under the current edition of the A.M.A., *Guides* (6th ed. 2009), muscle atrophy was a grade modifier, not the sole basis for an impairment rating. Dr. Slutsky noted that appellant's muscle atrophy had already been incorporated in the current two percent right lower extremity impairment rating.¹⁵ As such, the latest right lower extremity permanent impairment rating represented a six percent decrease from the prior rating/award. Because of numerous errors in the impairment ratings of record, Dr. Slutsky recommended that OWCP refer appellant for a second opinion evaluation, to include tri-compartment right knee x-rays, as well as appropriate measurements to determine if there was any ratable narrowing of the various knee compartments due to arthritis.

In an August 10, 2016 decision, OWCP denied appellant's claim for an additional schedule award. It based its determination of the DMA's May 23, 2016 report. It further noted that Dr. Guterman's impairment rating(s) contained various deficiencies as documented by the DMA. As such, OWCP found that the medical evidence did not support an increase over the previously awarded eight percent right lower extremity permanent impairment.

LEGAL PRECEDENT

Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹⁶ FECA, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.¹⁷ Effective May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).¹⁸

¹⁴ OWCP also provided Dr. Slutsky a copy of an October 11, 2010 examination report that it previously neglected to forward.

¹⁵ In his May 15, 2016 impairment rating, Dr. Slutsky included 1.8 centimeter atrophy as part of the physical examination grade modifier.

¹⁶ 5 U.S.C. § 8107(c). For a total or 100 percent loss of use of a leg, an employee shall receive 288 weeks' compensation. 5 U.S.C. § 8107(c)(2).

¹⁷ 20 C.F.R. § 10.404.

¹⁸ See Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

After obtaining all necessary medical evidence, the case file should be routed to the DMA for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*.¹⁹ The DMA should provide his or her rationale for the percentage of impairment specified.²⁰

When determining entitlement to a schedule award, pre-existing impairment to the scheduled member should be included.²¹ Impairment ratings for schedule awards include those conditions accepted by OWCP as job related, and any preexisting permanent impairment of the same member or function.²² If the work-related injury has affected any residual usefulness in whole or in part, a schedule award may be appropriate.²³ There are no provisions for apportionment under FECA.²⁴ When the prior impairment is due to a previous work-related injury and a schedule award has been granted for such prior impairment, the percentage already paid is subtracted from the total percentage of impairment.²⁵

ANALYSIS

The Board finds that the case is not in posture for decision.

By decision dated April 12, 2016, the Board remanded the case to OWCP with an instruction to have a DMA review the updated reports of Dr. Guterman.

In his May 15, 2016 report, Dr. Slutsky, OWCP's medical adviser, reviewed Dr. Guterman's December 2, 2014 report and rated two percent permanent impairment of the right leg under the A.M.A., *Guides*. He recommended, however, that appellant be referred for a second opinion examination with an orthopedic surgeon due to numerous errors in impairment ratings. Dr. Slutsky advised that the examiner should be directed to perform right knee x-rays in all three compartments and perform measurements for each compartment to determine whether there was ratable narrowing in any of the compartments. He reiterated this recommendation in his May 23, 2016 report. OWCP, however, did not follow through with this recommendation in its August 10, 2016 decision and found that, as Dr. Slutsky rated two percent permanent impairment of the right leg, appellant was not entitled to an additional schedule award. The Board finds that, as OWCP failed to fully develop the medical evidence following referral to a

¹⁹ *Id.* at Chapter 2.808.6f.

²⁰ *Id.*

²¹ *Carol A. Smart*, 57 ECAB 340, 343 (2006); *Michael C. Milner*, 53 ECAB 446, 450 (2002).

²² *Supra* note 18 at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5d.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at Chapter 2.808.7a(1); 20 C.F.R. § 10.404(c).

DMA, its August 10, 2016 decision must be set aside and remanded for further development consistent with the May 15, 2016 recommendations of the DMA.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. The claimant has the burden of proof to establish entitlement to compensation. However, OWCP shares responsibility in the development of the evidence to see that justice is done.²⁶ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.²⁷

On remand, OWCP should refer the matter to a second opinion orthopedic specialist for a new impairment rating.²⁸ In accordance with Dr. Slutsky's recommendation on May 15, 2016, the examiner should be directed to perform right knee x-rays in all three compartments and perform measurements for each compartment to determine whether there is a ratable narrowing in any of the compartments. Following this and any other further development as deemed necessary, OWCP shall issue an appropriate merit decision on appellant's schedule award claim.

CONCLUSION

The case is not in posture for decision.

²⁶ *William J. Cantrell*, 34 ECAB 1223 (1983).

²⁷ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

²⁸ *See supra* note 18 at Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(a) (September 2010).

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2016 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: December 28, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board